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MEGA CONTINENTAL SDN BHD v. AEON BIG (M) SDN BHD

HIGH COURT MALAYA, PULAU PINANG
AMARJEET SINGH SERJIT SINGH J
[ORIGINATING SUMMONS NO: PA-24NCvC-49-01-2021]
7 JUNE 2022

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Abstract – *A striking out application ought to be allowed only when an applicant has demonstrated that the other party's case discloses no reasonable cause of action for bringing the action in the first place, or it would be an abuse of process to allow it to continue, or that the action is scandalous, frivolous or vexatious or otherwise an abuse of the process of the court.*

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CIVIL PROCEDURE: *Originating summons – Declaratory orders – Declaration of right – Parties entered into leasing agreement – Agreement contained requirement of certain conditions to be fulfilled before capable of being registered as lease – Approval of Kedah State Authority under s. 433B of National Land Code – Non-fulfilment of condition – Declaration that agreement had become capable of registration as lease upon s. 433B approval being granted by State of Kedah and consequential declarations – Whether should be allowed*

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CIVIL PROCEDURE: *Striking out – Application for – Application to strike out originating summons – Whether originating summons disclosed reasonable cause of action – Whether barred by doctrine of res judicata – Whether scandalous, frivolous or vexatious or abuse of process of court – Whether originating summons obviously unsustainable – Whether should be heard on its merits – Rules of court 2012, O. 18 r. 19(1)*

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This case concerned an originating summons ('OS') and two notices of application to strike out the said OS. In the OS, the plaintiff sought several declarations concerning an agreement to lease, entered with the defendant ('agreement'). In the agreement, the defendant had agreed to lease a piece of land for operating a hypermarket in the State of Kedah. The agreement, where the plaintiff was the lessor and the defendant was the lessee, was a conditional one requiring certain conditions to be fulfilled before it was capable of being registered as a lease. The defendant through the Penang High Court OS ('OS 466/2019') had on the construction of certain clauses in the agreement, obtained a declaration to the effect that the agreement, for the non-fulfilment of the condition requiring approval of the Kedah State Authority under s. 433B of the National Land Code ('s. 433B approval') was converted and modified to a monthly tenancy ('2019 order'). In this OS, just as the defendant had done in OS 466/2019, the plaintiff sought a declaration of right based on the same clauses, except with the opposite effect, in that the agreement had become capable of registration as a lease on 2 December 2019 upon the s. 433B approval being granted by the State of Kedah and

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consequential declarations. The defendant filed two notices of application to strike out the instant OS under O. 18 r. 19(1) of the Rules of Court 2012 ('ROC'), on the grounds that the plaintiff had not disclosed a reasonable cause of action under para. (a) of the Rule and was barred by the doctrine of *res judicata* ('encl. 9') and paras. (b) and/or (c) and/or (d) of the Rule ('encl. 10').

Held (dismissing encls. 9 & 10; allowing OS in part):

(1) Enclosure 9 was misconceived in law. The remedy of a declaration of right is when the court is asked to state the rights or legal position of the parties such as whether a party is entitled to any legal character or to a right to any property or, as in this case, the rights of parties *vis-a-vis* an agreement. It is trite that when seeking a declaration of right, there is no requirement or need to establish a cause of action. Thus, when there is no requirement of establishing a cause of action, the application to strike out under para. (a) of O. 18 r. 19(1) of the ROC could not avail to a defendant. The factors for this court to make a declaratory order were present. The claim was one which was not obviously unsustainable. (paras 18, 21 & 22)

(2) The situation before the court was one where the exception to the doctrine of *res judicata* would apply. That the fact not available at the earlier proceedings only became available to the plaintiff after the earlier proceedings had been determined. The contention that the doctrine of *res judicata* applied by reason of Civil Action 04/2021 was without substance as the claim thereat was yet to be adjudicated. There was also no multiplicity or duplicity as contended. It is trite that a declaratory order makes no positive order and could not be enforced by execution as the remedy was only to declare the rights of the parties. The instant OS was not unsustainable and therefore, ought not to be struck out on the *res judicata* point or the duplicity and/or multiplicity point. (paras 24 & 31-33)

(3) Clause 37 of the agreement provides for the resolution of disputes. Clauses 37.1 and 37. 2 of the agreement provide that in the event of any disputes arising under the agreement to resolve the same first by way of mutual consultations, failing which to have the dispute referred to the court. The clauses no longer applied since the matter had already been referred to the court by the defendant in OS 466/2019 and the instant OS was but a result of that court proceeding. The defendant had relied on the 2019 order to terminate the agreement by a notice. Since then there were exchanges of correspondence between the parties to no avail and ultimately leading to the instant OS being filed. The defendant had taken advantage of court proceedings and now sought to deprive the plaintiff of the same right. In the circumstances, the instant OS was not obviously unsustainable on this ground. (para 35)

(4) The instant OS was not a suitable case to be struck out. The matter was not 'scandalous, frivolous or vexatious' or 'otherwise an abuse of the process of the court' and should be heard on its merits. (para 36)

(5) The court did not allow the second and fifth declarations sought by the plaintiff in view of granting the first, third and fourth declarations. The declarations not granted were: (i) that upon the s. 433B approval was given cl. 26.3 of the agreement was no longer applicable; and (ii) that upon the s. 433B approval was given, the defendant was in law and equity barred from relying on the 2019 order to terminate the agreement. The proper place for the determination of the sixth, seventh and eighth declarations sought by the plaintiff herein was at the hearing of Civil Action 04/2021. (paras 44 & 45)

Case(s) referred to:

Affin Bank Bhd v. Mohd Kasim Ibrahim [2013] 1 CLJ 465 FC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36; [1987] CLJ (Rep) 504 HC ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***

Jaafar Ibrahim v. Gan Kim Kin [1985] 1 LNS 176 FC ***(refd)***

Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong [1970] AC 1136 ***(refd)***

Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor [2019] 3 CLJ 157 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor (No 3) [2010] 1 CLJ 429 FC ***(refd)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 433(2), 433B

Rules of Court 2012, O. 18 r. 19(1)

For the applicant - Kenny Chan Kean Li, Lim Poh Leong & Yap Kah Keng; M/s Gibb & Co

For the respondent - R Jayasingam; M/s BH Lawrence & Co

Reported by Lina E

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This judgment concerns an originating summons and two notices of application to strike out the said originating summons. In the originating summons dated 19 January 2021, the plaintiff Mega Continental Sdn Bhd sought several declarations concerning an agreement to lease dated

21 October 2013 entered with the defendant, AEON Big (M) Sdn Bhd ("the instant originating summons" and "the agreement"). The agreement was a conditional one requiring certain conditions to be fulfilled before it is capable of being registered as a lease. In the agreement, the plaintiff was referred to as the lessor and the defendant as the lessee.

[2] On 18 November 2019, the defendant through Penang High Court Originating Summons No. PA-24NCvC-466-05-2019 ("OS 466/2019") had, on the construction of certain clauses in the agreement obtained a declaration to the effect that the agreement, for the non-fulfilment of the condition requiring approval of the Kedah State Authority under s. 433B of the National Land Code ("the 433B approval"), is converted and modified to a monthly tenancy ("the 2019 Order").

[3] In the instant originating summons, just as the defendant had done in OS 466/2019, is seeking a declaration of right based on the same clauses, except with the opposite effect, in that the agreement has become capable of registration as a lease on 2 December 2019 upon the 433B approval being granted by the State Authority of Kedah and consequential declarations.

[4] The defendant, on 9 March 2021 filed two notices of application to strike out the instant originating summons under O. 18 r. 19(1) of the Rules of Court 2012. The first application was made on the ground that the plaintiff had not disclosed a reasonable cause of action under para. (a) of the Rule ("encl. 9") while the second application was made under paras. (b) and/or (c) and/or (d) of the Rule ("encl. 10").

[5] I heard the striking out applications together with the instant originating summons. On 22 March 2022, I dismissed the striking out applications and in respect of the eight declarations sought in the instant originating summons made the following orders:

(i) allowed declarations (1), (3) and (4);

(ii) dismissed declarations (2) and (5); and

(iii) held that declarations (6), (7) and (8), being the subject matter of Penang High Court Civil Action No. PA-22NCvC-94-04-2021 ("Civil Action 04/2021") ought properly to be considered and determined therein.

[6] This judgment contains the reasons for my decision.

OS 466/2019 And The 2019 Order

[7] The starting point is OS 466/2019 wherein the defendant had sought a declaration of its right under the agreement. In the agreement, the defendant had agreed to lease a piece of land for operating a hypermarket in the State of Kedah. Clause 1.1 of the agreement defines "lease" to mean a registrable lease as prescribed under the National Land Code. The agreement was

conditional and one of the conditions was for the defendant to obtain the 433B approval, as provided in cl. 2(i) of the agreement. Clause 2(i) is in the following terms:

> If required, the Lessee shall, at its own costs and expenses, have obtained the consent of Economic Planning Unit of the Prime Minister Department ("the EPU Approval") and/or such other committees for the lease of the Demised Premises from the Lessor and the State Authority's approval ("the State Authority 433B Approval") in respect of the lease by the Lessee from the Lessor, pursuant to Section 433B of the National Land Code 1965 …

[8] On 15 December 2014 the plaintiff confirmed in a letter the mutual agreement, made pursuant to a meeting between the parties held on 12 December 2014, that the lease agreement shall only be dated and stamped upon the 433B approval being obtained from the State Authority. The plaintiff did whatever it could in assisting the defendant in its attempt to obtain the 433B approval but to no avail. Eventually, in a letter dated 2 November 2015, the State Authority informed the defendant that its application for the 433B approval had been rejected. The State Authority had refused the application on the ground that the defendant as a foreign company is required to obtain the 433B approval. The defendant appealed to the State Authority to reconsider the decision but to no avail.

[9] Thus, the agreement was not capable of being registered as a lease under the National Land Code until the 433B approval is obtained from the State Authority of Kedah. I held that the rejection by the State Authority of Kedah had triggered cl. 26.3 of the agreement which reads as follows:

> The parties agree that in the event the Lease Agreement shall yet to be executed by the Commencement Date for any reason whatsoever, this Agreement shall continue to be binding upon the parties until the Lease Agreement shall be duly executed and stamped. In such an event the parties further agree that from the Commencement Date till the date of the fulfilment of the conditions set out in Clause 2 above or the date of the Lease Agreement, whichever shall be the later, the lease stipulated in this Agreement shall be converted and modified into a monthly tenancy wherein the Lessee shall rent the Demised Premises from the Lessor on a monthly basis at the same rental stipulated in this Agreement.

[10] In granting the 2019 Order, I held that cl. 26.3 of the agreement has an inbuilt mechanism to convert and modify the agreement into a monthly tenancy until the lease agreement is capable of being registered. The plaintiff appealed against my decision and was unsuccessful upon exhausting all avenues of appeal. The 2019 Order had therefore become the truth between the parties. The agreement stood as a monthly tenancy as intended by the parties.

Events Subsequent To The 2019 Order

[11] The 2019 Order was made on 8 November 2019. After this order was made, the State Authority of Kedah informed the plaintiff *vide* letter dated 2 December 2019 through the office of and under the hand of the State Secretary of Kedah that the 433B approval had been granted, the relevant part of this letter state as follows:

> Rayuan Untuk Membenarkan Permohonan Kebenaran Untuk Mendaftarkan Pajakan Hartanah Oleh Kepentingan Asing Di Bawah Seksyen 433b Kanun Tanah Negara 1965
>
> Dengan segala hormatnya perkara tersebut di atas dirujuk dan surat dari Belleview Group no. rujukan MCSB/AEONBIG/LPL/CMT/0007 bertarikh 11 November 2019 adalah dirujuk.
>
> 2. Untuk makluman YBhg Dato', Kerajaan Negeri Kedah telah meluluskan permohonan kebenaran untuk mendaftarkan pajakan hartanah oleh kepentingan asing di bawah Seksyen 433b, Kanun Tanah Negara 1965 dan perkara ini sedang dalam tindakan Pejabat Pengarah Tanah Dan Galian (PTG) Negeri Kedah.

[12] The approval was notified to the defendant in a letter dated 4 December 2020. The defendant did not proceed to effectuate the registration of the lease and instead on 13 March 2020, relying on the 2019 Order, issued one month's notice to terminate the agreement. The plaintiff issued letters dated 17 March 2020, 2 April 2020 and 15 April 2020 to dissuade the defendant from proceeding with the termination but to no avail. On 20 June 2020, the defendant left the hypermarket premises.

[13] On 4 May 2020, the plaintiff filed at the Alor Setar High Court Civil Action No. KA-22NCvC-25-05-2020 against the defendant seeking, *inter alia*, specific performance of the agreement or *in lieu* thereof damages amounting to RM50,679,997.44, the sum equivalent to the unexpired remaining duration of the lease, which is until December 2024 and damages amounting to RM91,844,409.81 being the alleged costs for building the hypermarket.

[14] On 20 January 2021, the plaintiff filed and on 6 April 2021 obtained an order from the Alor Setar High Court to transfer the said civil action to the Penang High Court. The said civil action was thereafter given a new registration number at the Penang High Court, namely, Civil Action 04/2021. That action is still pending.

The Instant Originating Summons

[15] It was the plaintiff's view that when the 433B approval was granted, all the necessary conditions had been satisfied and the agreement had on that date, pursuant to relevant clauses therein, become capable of being registered as a lease. On 19 January 2021, the plaintiff sought to declare its right under the agreement and sought the following eight declarations:

A (1) Satu deklarasi bahawa Syarat-Syarat Terdahulu di bawah Klausa 2.1(i) Perjanjian Untuk Memajak bertarikh 21/10/2013 (selepas ini dirujuk sebagai "Perjanjian Untuk Memajak tersebut") dan yang dirujuk di dalam Klausa 26.3 Perjanjian Untuk Memajak tersebut telah dipenuhi dan/atau dilaksanakan apabila Pejabat Setiausaha Kerajaan Negeri Kedah Darul Aman memberikan kebenaran untuk
B mendaftarkan Pajakan hartanah oleh Kepentingan Asing di bawah Seksyen 433B Kanun Tanah Negara 1965 melalui surat mereka yang bertarikh 2/12/2019 (selepas ini dirujuk sebagai "Kebenaran Pihak Berkuasa tersebut").

(2) Satu deklarasi bahawa apabila Kebenaran Pihak Berkuasa tersebut
C seperti yang tertera dalam Klausa 2.1(i) Perjanjian Untuk Memajak diberikan maka Klausa 26.3 Perjanjian Untuk Memajak tersebut adalah tidak lagi terpakai.

(3) Satu deklarasi bahawa apabila Kebenaran Pihak Berkuasa tersebut iaitu Syarat-Syarat Terdahulu di bawah Klausa 2.1(i) Perjanjian
D Untuk Memajak tersebut telah diberikan, terma dalam Perjanjian bertarikh 5/12/2014 (selepas ini dirujuk sebagai "Perjanjian Pajakan tersebut") adalah terikat sementara menunggu pendaftaran Borang 15A Kanun Tanah Negara 1965 dengan Pejabat Tanah yang berkenaan.

(4) Satu deklarasi bahawa Penyewaan Bulanan Tersebut yang
E diwujudkan sementara menunggu pemenuhan Syarat-Syarat Terdahulu dibawah Klausa 26.3 Perjanjian Untuk Memajak tersebut, telah secara automatik diperbalikan ("reverted") kepada Pajakan di bawah Perjanjian Untuk Memajak tersebut apabila Kebenaran Pihak Berkuasa tersebut diberikan sepertimana yang
F tertera di bawah Klausa 2.1 Perjanjian Untuk Memajak tersebut.

(5) Satu deklarasi bahawa apabila Kebenaran Pihak Berkuasa tersebut diberikan, Defendan telah di bawah peruntukkan undang-undang dan/atau Ekuiti dihalang daripada bergantung terhadap Deklarasi yang diberikan di dalam Perintah Mahkamah Tinggi Pulau Pinang di bawah Saman Pemula No. PA-24NCVC-466-05/2019 bertarikh 8/
G 11/2019 untuk menamatkan Perjanjian Untuk Memajak tersebut dan/atau Perjanjian Pajakan Tersebut.

(6) Satu Deklarasi bahawa penamatan Perjanjian Untuk Memajak tersebut dan/atau Perjanjian Pajakan tersebut oleh Defendan melalui surat mereka bertarikh 13/3/2020 selepas Kebenaran Pihak
H Berkuasa tersebut tersebut diberikan adalah melanggari Klausa 1.1 ("Istilah Awal"), Klausa 3.1 dan Klausa 27 dalam Perjanjian Untuk Memajak Tersebut.

(7) Satu Deklarasi bahawa Pajakan untuk tempoh Istilah Awal selama sepuluh (10) tahun tidak boleh ditamatkan menurut peruntukkan di
I bawah Klausa 27 dalam Perjanjian Untuk Memajak tersebut.

(8) Satu Deklarasi bahawa penamatkan Perjanjian Untuk Memajak tersebut dan/atau Perjanjian Pajakan tersebut oleh Defendan melalui surat mereka yang bertarikh 13/3/2021 selepas Kebenaran Pihak Berkuasa tersebut diberikan adalah satu penamatan yang tidak sah.

Decision Of The Court

[16] I will give my reasons for striking out the applications followed with my determination of the instant originating summons.

Enclosure 9

[17] The ground to strike out raised by the defendant in encl. 9 is that the instant originating summons does not disclose a reasonable cause of action and is barred by the doctrine of *res judicata*. Incidentally, the doctrine is the same reason advanced to strike out the instant originating summons in encl. 10.

[18] In my judgment, encl. 9 is misconceived in law. My reasons are as follows. The remedy of a declaration of right is when the court is asked to state the rights or legal position of the parties such as whether a party is entitled to any legal character, or to a right to any property or as in this case the rights of parties *vis-à-vis* an agreement. It is trite that when seeking a declaration of right there is no requirement or need to establish a cause of action. Thus, when there is no requirement of establishing a cause of action an application to strike out under para. (a) of O. 18 r. 19(1) of the Rules of Court 2012 cannot avail to a defendant. The Privy Council in *Rediffusion (Hong Kong) Ltd v. Attorney-General Of Hong Kong* [1970] AC 1136 at 1167 summed up the position in this area as follows:

> There may be circumstances under which a person may have the right to go to a Court for a declaration (whether or not he seeks other relief) without being able to or having to show that he has a cause of action apart from his claim for a declaration. His application will not be defeated because he applies merely for a declaratory judgment or order. His application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action: *Guaranty Trust Company of New York v. Hannay & Co.* [1915] 2 KB 536. As Banker LJ said in that case there would be the limitation that the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction.

[19] In this regard, the Federal Court in *Affin Bank Bhd v. Mohd Kasim Ibrahim* [2013] 1 CLJ 465 had adopted and approved the principle on the standing of a person seeking a declaration of right stated by Siti Norma Yaakob J (as Her Ladyship then was) in *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1987] 2 CLJ 36; [1987] CLJ (Rep) 504. In that case Her Ladyship had said:

PW Young in his book on *Declaratory Orders*, 2nd. Ed., defines *a declaratory judgment as one that does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order.* These are:

(1) There must exist a controversy between the parties.

(2) The proceedings must involve a "right".

(3) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as "standing" or "*locus standi*".

(4) The controversy must be subject to the court's jurisdiction.

(5) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.

(6) The issue must be ripe, *ie*, it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.

All these six conditions are met by the facts of this case and there is therefore no merit to the defendants' contention that the plaintiff's claims cannot be maintained. (emphasis added)

[20] Earlier the Federal Court in *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 said as follows:

Although **it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action,** he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief. (emphasis added)

[21] I find that the basis for seeking the declarations in the instant originating summons is for a declaration of the plaintiff's right under the agreement. There is a controversy between the parties as to their legal position under the agreement. I find that the factors for this court to make a declaratory order are present.

[22] In such circumstances, the claim is one which is not obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). For the above reasons encl. 9 is dismissed.

Enclosure 10

[23] The reasons proffered by the defendant in encl. 10 as to why the instant originating summons should be struck out are as follows:

(i) that the plaintiff had failed to comply with cls. 37.1 and 37.2 of the agreement which provides the process and time of settling a dispute and therefore the instant originating summons was pre-mature;

(ii) that the doctrine of estoppel *res judicata* in the wider sense applied to bar the plaintiff from filing the instant originating summons as the matter has been dealt with in OS 466/2019; and

(iii) the instant originating summons raises the issue of *res judicata* and the issue of duplicity and/or multiplicity with Civil Action 04/2021.

[24] I begin with the doctrine of *res judicata*. I found that the instant originating summons was not one which was unsustainable on this ground. These are my reasons.

[25] The relevant and established principles concerning the doctrine has been stated in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 and can be summarised as follows:

(i) The public policy of the law is that there should be finality in litigation and that no one ought to be vexed twice for the same cause of action.

(ii) When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata* because the judgment becomes the truth between such parties. Its significance is that an estoppel *per rem judicatum* is created.

(iii) There are two types of estoppels *per rem judicatum*:

(a) The first is "cause of action estoppel" which occurs when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment. The cause of action merges into the said final judgment. Such estoppel of cause of action is extended to all causes of action (based on the same facts or issues) which should have been litigated in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.

(b) The second is "issue estoppel" which means an issue which a party is estopped from raising in a subsequent proceeding. The parties are estopped from challenging the correctness of the decision of a previous final judgment either by evidence or argument in which the parties or their privies were parties.

(iv) Issue estoppel not only applies to issues actually decided by the court in the previous proceedings but also **to issues which might have been and which were not brought forward either deliberately or due to negligence or inadvertence in an earlier proceeding.** These issues though not decided in the previous proceedings are covered by the doctrine (the doctrine in its wider sense). (emphasis added)

[26] The doctrine in its wider sense stated by the Federal Court is founded on the principle enunciated by Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 in the following words:

A I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, *the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest,* but which was
B not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.*
C (emphasis added)

[27] An application of the established principles would naturally require a comparison being made of OS 466/2019 and the instant proceedings and the issues that had been determined.

D **[28]** The OS 466/2019 proceedings sought to declare the rights of the parties under the agreement as a result of the rejection of the application of a 433B approval by the State Authority of Kedah ("the condition precedent"). The purpose of the principal declaration sought was the status of the agreement as a result of the rejection of the application of the 433B
E approval, namely, whether the agreement is converted and modified into a monthly tenancy. At that point in time, and in particular when the 2019 Order was made, the condition precedent for the agreement capable of being registered as a lease was non-existent by virtue of the said rejection. In making the declaration I had to construe certain provisions of the agreement,
F in particular, cls. 2(i) and 26.3.

[29] Whereas, in the instant originating summons, this court is moved for a declaration of right of the parties under the same provisions of the agreement but based on an event happening after OS 466/2019 was determined which was the granting of the 433B approval by the State
G Authority of Kedah – a fact not available and opposite to that which was available at the earlier proceedings. The issue now is to be considered based on a different fact and would have a profound effect on the legal position of the parties. The issue is whether with the subsequent granting of the 433B approval, the conversion and modification of the agreement into a monthly
H tenancy ceases and the agreement has become capable of registration under the National Land Code.

[30] The defendant contended that the doctrine of *res judicata* in its wider sense is applicable. If the doctrine in the wider sense is applicable then the instant originating summons would be an abuse of the process of the court
I and liable to be struck out. The plaintiff contended that the fact of the 433B approval was not available then and could not be raised at the hearing of OS 466/2019 and therefore the instant originating summons is not caught by the doctrine of *res judicata.*

[31] In my view, the situation before me is one where the exception to the doctrine of *res judicata* would apply. That the fact not available at the earlier proceedings only became available to the plaintiff after the earlier proceedings had been determined. The exceptions to the doctrine are stated in *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor* [2019] 3 CLJ 157 as follows:

> [43] It is clear however from decided cases that the circumstances alluded to by the Court of Appeal (*ie*, non consideration of the provisions of the GCA 1949) do not fall within **the exceptions to the doctrine of *res judicata* which are limited to the following situations: fraud or where evidence not available at the original hearing becomes available** (see *Arnold and others v. National Westminister Bank Plc* [1991] 3 All ER 41; [1991] 2 AC 93 and *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143).
>
> (emphasis added)

[32] In this regard, the contention that the doctrine of *res judicata* applies by reason of Civil Action 04/2021 is without substance as the claim thereat is yet to be adjudicated. There is also no multiplicity or duplicity as contended. It is trite that a declaratory order makes no positive order and cannot be enforced by execution as the remedy is only to declare the rights of the parties (*Takako Sakao v. Ng Pek Yuen & Anor (No. 3)* [2010] 1 CLJ 429; [2010] 2 MLJ 141). The Civil Act 04/2021 is a claim in private law against the defendant for breach of contract.

[33] For the above reasons, the instant originating summons is not unsustainable and therefore ought not to be struck out on the *res judicata* point or the duplicity and/or multiplicity point.

[34] The next point in encl. 10 is that the instant originating summons is pre-mature for not complying with cls. 37.1 and 37.2 of the agreement which provides the process and time of settling a dispute.

[35] Clause 37 provides for the resolution of disputes. Clauses 37.1 and 37.2 provides that in the event of any disputes arising under the agreement to resolve the same first by way of mutual consultations, failing which to have the dispute referred to the court. In my view, the clauses no longer apply since the matter had already been referred to the court by the defendant in OS 466/2019 and the instant originating summons is but a result of that court proceedings. The defendant had relied on the 2019 Order to terminate the agreement by a notice dated 13 March 2020. Since then there were exchange of correspondences between the parties to no avail and ultimately leading to the instant originating summons being filed on 19 January 2021. The defendant had taken advantage of court proceedings and now seeks to deprive the plaintiff of the same right. In the circumstances I hold that the instant originating summons is not obviously unsustainable on this ground.

[36] For the above reasons, the instant originating summons is not a suitable case to be struck out. The matter is not "scandalous, frivolous or vexatious" or "otherwise and abuse of the process of the court" and should be heard on its merits.

The Instant Originating Summons

[37] Following my reasoning and findings in OS 466/2019 and on the interpretation of cls. 2(i) and 26.3 of the agreement it follows that the agreement although converted and modified into a monthly tenancy had become capable of being registered as a lease upon the 433B approval being granted by the State Authority. I had held then and still hold the view in the instant originating summons that:

> Clause 26.3 of the agreement states that the agreement shall continue to bind the parties until the fulfilment of the condition precedents in Clause 2 and until then, the agreement shall be converted and modified into a monthly tenancy …

[38] In my view the only condition precedent required to render the lease capable of registration under the terms of the agreement and the National Land Code was the 433B approval. Pending the 433B approval, as required by cl. 26.3, the agreement remains converted and modified into a monthly tenancy. The conversion and modification as a tenancy agreement was therefore not permanent and is to continue so long as the condition precedents remain unfulfilled. That was the intention of the parties. Once all the condition precedents are fulfilled, the agreement become capable of being registered as a lease. How the parties conduct themselves what actions can be taken by the parties and the validity of such actions therefrom is not for this court to speculate at this time.

[39] The defendant contended that there is no 433B approval because only the Kedah Land Office, in other words the Director of Land and Mines, is the proper party to issue the State Authority's approval and not the State Secretary. I found it not unlawful for the State Secretary of Kedah to have issued the letter informing of the 433B approval. It is a bit strange that the said approval was granted after an appeal by Belleview Group dated 11 November 2019 and directed to the plaintiff and not on an appeal by the defendant. But that is not made an issue and therefore left at that.

[40] Nevertheless, the 433B approval was made by the State Authority of Kedah, the entity empowered by s. 433(2) of the National Land Code to make such decision. It is in actual fact the decision of the State Executive Council of the State Government of Kedah which is the State Authority in the instant case. Thus, there is no impediment that the letter informing of the decision to grant the 433B approval is made by the State Secretary of Kedah who is also the secretary for the State Authority. In any event what is being conveyed is the decision of the 433B approval. There is nothing on record

to show that the defendant upon being informed of the said letter had written to or obtained confirmation to the contrary form the Director of Land and Mines, Kedah.

[41] It was further contended that the condition precedent period of the agreement had expired in the event this court was minded to hold that there is a valid 433B approval. I agree with counsel that time is no longer of the essence and has been enlarged. The period expired on 20 March 2014 and the extended period expired on 20 June 2015. However, the defendant only made the application for the 433B approval on 29 July 2015. This is further evidenced by the parties not utilising cl. 2.7 to terminate the agreement. Finally, the application by the defendant which resulted in the defendant obtaining a declaration of right dated 18 November 2019 stating that the agreement is converted and modified to a monthly tenancy until the condition precedents are fulfilled. Thus, the issue of the condition precedents period is immaterial to challenge the validity of the approval.

[42] In this regard it suffices to say that the cases *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201 and *Jaafar Ibrahim v. Gan Kim Kin* [1985] 1 LNS 176; [1985] 2 MLJ 24 are distinguishable on the facts.

[43] As a result I granted the following three declarations:

(1) Satu deklarasi bahawa Syarat-Syarat Terdahulu di bawah Klausa 2.1(i) Perjanjian Untuk Memajak bertarikh 21/10/2013 (selepas ini dirujuk sebagai "Perjanjian Untuk Memajak tersebut") dan yang dirujuk di dalam Klausa 26.3 Perjanjian Untuk Memajak tersebut telah dipenuhi dan/atau dilaksanakan apabila Pejabat Setiausaha Kerajaan Negeri Kedah Darul Aman memberikan kebenaran untuk mendaftarkan Pajakan hartanah oleh Kepentingan Asing di bawah Seksyen 433B Kanun Tanah Negara 1965 melalui surat mereka yang bertarikh 2/12/2019 (selepas ini dirujuk sebagai "Kebenaran Pihak Berkuasa tersebut").

(3) Satu deklarasi bahawa apabila Kebenaran Pihak Berkuasa tersebut iaitu Syarat-Syarat Terdahulu di bawah Klausa 2.1(i) Perjanjian Untuk Memajak tersebut telah diberikan, terma dalam Perjanjian bertarikh 5/12/2014 (selepas ini dirujuk sebagai "Perjanjian Pajakan tersebut") adalah terikat sementara menunggu pendaftaran Borang 15A Kanun Tanah Negara 1965 dengan Pejabat Tanah yang berkenaan.

(4) Satu deklarasi bahawa Penyewaan Bulanan Tersebut yang diwujudkan sementara menunggu pemohonan Syarat-Syarat Terdahulu dibawah Klausa 26.3 Perjanjian Untuk Memajak tersebut, telah secara automatik diperbalikan ("reverted") kepada Pajakan di bawah Perjanjian Untuk Memajak tersebut apabila Kebenaran Pihak Berkuasa tersebut diberikan sepertimana yang tertera di bawah Klausa 2.1 Perjanjian Untuk Memajak tersebut.

[44] I did not allow the second and fifth declarations sought by the plaintiff in view of granting the first, third and fourth declarations. The declarations not granted were: (i) that upon the 433B approval is given cl. 26.3 of the agreement is no longer applicable; and (ii) that upon the 433B approval is given the defendant is in law and equity barred from relying on the 2019 Order to terminate the agreement.

[45] In my view the proper place for the determination of the sixth, seventh and eighth declarations sought by the plaintiff herein is at the hearing of Civil Action 04/2021. The declarations are to have the following effect: (i) that the notice of termination dated 13 March 2020 is against cls. 1.1, 3.1 and 27 of the agreement; (ii) that the lease for ten years cannot be determined under cl. 27 of the agreement; and (iii) that the notice of termination dated 13 March 2020 after the 433B approval has been granted is an unlawful termination are issues to be determined at that hearing. They are proper issues to be resolved where the relief of specific performance or damages *in lieu* thereof are sought. These issues are tied to the question whether the notice of termination is valid in relation to the cause of action of breach of contract.